

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
2011 APR -1 PM 4:27
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY *OS*

FULCRUM CREDIT PARTNERS LLC, §
PLAINTIFF, §
§
V. §
§
STRATEGIC CAPITAL §
RESOURCES, INC., §
DEFENDANT. §

CAUSE NO. A-10-CA-137-LY

ORDER ON REPORT AND RECOMMENDATION

Before the Court is the above styled and numbered cause. The Court referred the following to the United States Magistrate Judge for Report and Recommendation: Defendant Strategic Capital Resources, Inc.'s Amended Motion for Summary Judgment and Brief in Support filed December 17, 2010 (Doc. #65); Fulcrum's Response to Strategic's Amended Motion for Summary Judgment and Brief in Support filed January 3, 2011 (Doc. #70); Defendant Strategic Capital Resources Inc.'s Reply Brief in Support of its Amended Motion for Summary Judgment filed January 18, 2011 (Doc. #80); Defendant Strategic Capital Resources Inc.'s Objection to Plaintiff's Summary Judgment Evidence filed January 18, 2011 (Doc. #81); and Fulcrum's Response to Strategic's Objection to Plaintiff's Summary Judgment Evidence filed February 1, 2011 (Doc. #89). *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72, Loc. R. W.D. Tex. Appx. C, R. 1(c). By Report and Recommendation of the United States Magistrate Judge signed March 15, 2011 (Doc. #93), the Magistrate Judge recommends that this Court grant in part Defendant Strategic Capital Resources, Inc.'s Amended Motion for Summary Judgment to the extent that the Court dismiss Plaintiff's claims of unjust enrichment and money had and received, and with regard to all other matters deny

the motion. Further, the Magistrate Judge recommends that this Court dismiss Defendant Strategic Capital Resources Inc.'s Objection to Plaintiff's Summary Judgment Evidence.

The parties received the Report and Recommendation on March 15, 2011, and objections if any, were due to be filed by March 29, 2011. *See* Fed. R. Civ. P. 72(b)(2). Defendant filed objections on March 29, 2011 (Doc. #98). In light of the objections, the Court has undertaken a *de novo* review of the entire case file. *See* Fed. R. Civ. P. 72.

The Court holds that the findings and conclusions of the Magistrate Judge are proper and, for substantially the reasons stated therein, the Court will approve and accept the Report and Recommendation. Defendant objects to the Magistrate Judge's finding that the intent of the parties with regard to the existence of a binding contract is disputed and that the determination of intent is a question of fact. Defendant further objects to the Magistrate Judge's finding that Plaintiff's damages for breach of contract may not be limited to the difference between the proposed sale price by Defendant and the purchase price of the third party.

The Court agrees with the Magistrate Judge's finding that the intent of the parties regarding the formation of a binding contract are disputed and should be determined by the trier of fact. As noted by the Magistrate Judge in his Report and Recommendation, this Court made a similar finding in the order on Plaintiff's motion for preliminary injunction rendered March 24, 2010 (Doc. #18). With regard to the measure of Plaintiff's breach-of-contract damages, the Court again agrees with the Magistrate Judge's finding that the caselaw does not support Defendant's assertion that Plaintiff's measure of damages is necessarily limited to that which Defendant's assert.

IT IS ORDERED that Defendant Strategic Capital Resources, Inc.'s Objections to Report and Recommendation of United States Magistrate Judge (Doc. #98) are **OVERRULED**.

IT IS FURTHER ORDERED that the United States Magistrate Judge's Report and Recommendation (Doc. #93) filed in this action is hereby **APPROVED AND ACCEPTED**.

IT IS FURTHER ORDERED that Defendant Strategic Capital Resources, Inc.'s Amended Motion for Summary Judgment (Doc. #65) is **GRANTED IN PART TO THE EXTENT** that Plaintiff's claims related to unjust enrichment and money had and received are **DISMISSED WITH PREJUDICE**, and with regard to all other matters is **DENIED**.

IT IS FURTHER ORDERED that Defendant Strategic Capital Resources Inc.'s Objection Plaintiff's Summary Judgment Evidence filed January 18, 2011 (Doc. #81) are **DISMISSED**.

SIGNED this 1st day of April, 2011.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE